UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

UNITED STATES OF AMERICA	)	
	)	
v.	)	No. 2:01-cr-12-01
	)	
DONALD FELL	)	

OPINION AND ORDER

Defendant Donald Fell filed motions for judgment of acquittal and new trial on August 26, 2005, following a jury verdict of guilty reached on June 24 and the jury's unanimous decision, reached July 14, that a sentence of death be imposed upon him as a consequence of his conviction on counts one and two of the superseding indictment. Fell does not attack his conviction however, but argues solely that prosecutorial misconduct at sentencing requires that he receive a sentence of life imprisonment, or alternatively that he receive a new sentencing hearing. For the reasons that follow, the motions are denied.

Background

On November 27, 2000 Donald Fell and Robert Lee killed Fell's mother, Debra Fell, and her friend Charles Conway at Debra Fell's home in Rutland, Vermont. Both Debra Fell and Conway were stabbed repeatedly and their throats were slashed. After the killings, Fell and Lee, armed with a .12 gauge shotgun, went looking for a car to steal to flee the area. They found 53-year-old Terry King arriving for her 4:00 a.m. shift at the Price

Chopper supermarket, abducted her and stole her car.

Fell drove King's car out of Vermont while Lee, in the front passenger seat, held the shotgun on King in the back seat. After driving for about four hours, Fell stopped the car on the side of the road in rural Dover, New York. The men ordered King out of the car and told her to run into the woods. They followed her into the woods, pushed her to the ground and beat her to death by kicking her, smashing her head with a rock and stomping on her neck with their booted feet. On November 30, Fell and Lee were arrested in King's car in Clarksville, Arkansas.

On February 1, 2001 a federal grand jury charged Fell and Lee with four crimes arising out of the abduction and murder of King: carjacking with death resulting; kidnaping with death resulting; use of a firearm during a crime of violence; and being a fugitive in possession of a firearm. The first two counts charged capital crimes.

In May 2001 Fell and the government considered entering into a plea agreement in which he would plead guilty to the kidnaping charge in exchange for a sentence of life imprisonment without parole. An Assistant United States Attorney drafted a plea agreement, and Fell and his attorneys signed it, aware, however, that the agreement required approval by the United States Attorney General. The plea agreement detailed "substantial mitigating evidence" that supported this proposed disposition:

Fell's mental health history, his mental condition and impaired capacity at the time of the crimes; his youth; his remorse and acceptance of responsibility; his assistance to authorities; and lack of any substantial prior criminal history.

The Attorney General rejected the proposed plea agreement, and in January 2002 the government filed a Notice of Intent to Seek Death Penalty, in compliance with 18 U.S.C.A. § 3593(a) (West). The notice informed Fell that the government intended to prove four threshold culpability factors under § 3591(a)(2) (West)[1], three statutory aggravating factors under § 3592(c)[2] (West), and four non-statutory aggravating factors under § 3593(a).[3]

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[1] The government's threshold culpability factors were that Fell (1) was 18 years of age or older at the time of the offense; (2) intentionally killed King; (3) intentionally inflicted serious bodily injury that resulted in King's death; and (4) intentionally participated in one or more acts, contemplating that the life of a person would be taken or intending that lethal force would be used in connection with a person other than a participant in the offense, and King died as a direct result of such act or acts.

[2] The government's statutory aggravating factors were: (1) the death of King occurred during the commission of a kidnaping; (2) Fell killed King in an especially heinous, cruel or depraved manner that involved serious physical abuse; (3) Fell intentionally killed more than one person in a single criminal episode.

[3] The government's non-statutory aggravating factors were: (1) Fell participated in the abduction of King to facilitate his escape from the area in which he and Lee had committed a double murder; 2) Fell participated in the murder of King to prevent her from reporting the kidnaping and carjacking to authorities; (3) Fell participated in the murder of King after substantial

On July 8, 2002 the grand jury returned a superseding indictment charging Fell[4] with the same four offenses as the original indictment. In addition, however, the superseding indictment contained a "Notice of Special Findings" alleging that Fell's conduct met the threshold culpability factors specified in § 3591(a)(2), and three statutory aggravating factors, §§ 3592(c)(1), (6) and (16). The superseding indictment was obtained in order to secure grand jury review of the statutory factors upon which the government was relying in its pursuit of the death penalty for Fell. *See United States v. Quinones*, 313 F.3d 49, 53 n.1 (2d Cir. 2002); *see also United States v. Allen*, 406 F.3d 940, 943 (8th Cir. 2005) (en banc) (5th Amendment requires at least one statutory aggravating factor and mens rea requirement to be found by grand jury and charged in indictment); *United States v. Robinson*, 367 F.3d 278, 284 (5th Cir.), *cert. denied,* 543 U.S. 1005 (2004) (government must charge statutory aggravating factors by indictment). The government again gave notice of the four non-statutory aggravating factors it alleged in its original notice, although it did not submit these factors to the grand jury.

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premeditation to commit the crime of carjacking; and (4) King's killing caused her family extreme emotional suffering and severe and irreparable harm.

[4] In September 2001 Robert Lee committed suicide while in prison.

Fell filed several pretrial motions, including a motion to dismiss the Notice of Intent to Seek Death Penalty on estoppel and due process grounds,[5] and a challenge to the constitutionality of the Federal Death Penalty Act. On September 24, 2002, the Court ruled that the Act's directive to ignore the rules of evidence when considering information relevant to death penalty eligibility violated the Due Process Clause of the Fifth Amendment and the rights of confrontation and cross-examination guaranteed by the Sixth Amendment. *United States v. Fell*, 217 F. Supp. 2d 469 (D. Vt. 2002), *vacated*, 360 F.3d 135 (2d Cir.), *cert. denied*, 543 U.S. 946 (2004). The government appealed the ruling, which was vacated in 2004. *Fell*, 360 F.3d at 146.

Upon return of the mandate to this District in October 2004, Fell filed notice, pursuant to Rule 12.2(b) of the Federal Rules of Criminal Procedure, that he intended to introduce expert evidence relating to his mental condition that would have a bearing on the issue of punishment in his capital case. *See* Fed. R. Crim. P. 12.2(b). The issue had arisen before. In 2001, during the Department of Justice's review of the case to determine whether the Attorney General wished to seek the death penalty, defense counsel presented mitigating information to the government, including evaluations of Fell by a psychiatrist, a

[5] This motion was denied in a memorandum opinion and order dated June 26, 2002 (Doc. 56).

clinical psychologist, and a neuropharmacologist. Anticipating that Fell would present mitigating evidence relating to his mental state either at trial or at sentencing, the government moved in early 2002 for disclosure of this evidence and for Fell to submit to examination by a government expert.

Fell and his counsel agreed to allow the government's experts, Richard Wetzel, Ph.D. and John Rabun, M.D., to examine him, although they restricted the scope of the questioning, and members of the defense team attended the interviews. Dr. Wetzel administered two tests to Fell, based on oral questions. Both experts submitted written reports in late 2002. In light of Fell's Rule 12.2(b) notice, the government renewed its request in late 2004 for an unrestricted examination of Fell, but by a new expert, a forensic psychiatrist it retained in early 2004. The government's expert, Michael Welner, M.D., had already, in the government's words, "engaged in an extensive evaluation of the defendant," reviewing thousands of documents and conducting three days of interviews in Fell's home town, as well as consulting with the government on the case on multiple occasions. Mot. to Reconsider at 4-5 (Doc. 105).

The Court permitted an unrestricted examination of Fell, as long as the interview was recorded, the defense had access to simultaneous audio and video feed, and any results or reports of the examination were sealed unless and until he was found guilty

of a capital crime. *See* Fed R. Crim. P. 12.2(c)(2). However, the Court required that the government make use of one of its two experts who had already interviewed Fell, rather than subject Fell to a third interviewer. Op. & Order at 17-18 (Doc. 99). And the Court's Order stated: "[p]rior to any mental health testing being conducted by any expert for the government, the government shall provide to counsel a list of any tests its expert wishes to perform," for purposes of enabling Fell to object to a test. Order at 2 ("April 7 order") (Doc. 101). It stated further: "[n]o mental health testing may be performed by either party until there is a final decision as to which tests are to be conducted by the government's expert." *Id.* at 3.

The government moved to reconsider the April 7 order, promising that Welner would "not conduct new neurological, personality or intelligence testing; he would rely upon data from the 2001 and 2002 examinations." Mot to Reconsider at 2. It stated that it intended to call Welner as a penalty phase rebuttal witness regardless of whether he were permitted to conduct the interview of Fell. *Id.* at 5.

Fell filed a motion in limine to exclude Welner's expected testimony on the grounds that his testimony at sentencing would be cumulative, that absent an interview of Fell his testimony would have to be limited in some unspecified way, that any testimony on future dangerousness would be inadmissible, that

Welner's testimony would likely be a conduit for unreliable hearsay, and that certain of his theories would be inadmissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Fell sought a proffer as to the substance of Welner's testimony. Mot. in Limine (Doc. 107).

The government responded that Welner was a rebuttal witness for the sentencing phase of the trial, and the scope of his testimony would depend on the evidence presented by the defense. The Court denied the government's motion to reconsider, and it denied Fell's motion in limine as premature: "the Court can address the admissibility of his testimony only after disclosure of the subject of that testimony." Op. & Order at 17 (Doc. 131).

Jury selection commenced on May 4, 2005. On June 13, 2005, at the behest of the government, Wetzel interviewed Fell for approximately eight hours. He did not conduct any psychological tests, but queried Fell about the circumstances of the offenses and Fell's background. After the interview the government arranged for the videotaped interview to be converted to DVD form, and copies of the DVD conversion were provided to the government's experts, Wetzel, Rabun and Welner. Neither the government nor the defense received copies of Wetzel's interview until after the guilt phase of the trial had concluded. *See* Fed. R. Crim. P. 12.2(c)(2).

The trial commenced Monday, June 20, 2005. The evidence was

closed on Friday, June 24, and the jury returned a verdict of guilty on all counts. On Tuesday, June 28, the penalty phase of the trial began. The defense confirmed that it intended to present expert evidence concerning Fell's mental condition from two experts: Mark J. Mills, M.D. and Mark Cunningham, Ph.D. The government sought discovery concerning Cunningham's and Mills' testimony, and requested a *Daubert* hearing with respect to Cunningham's testimony. The defense moved to exclude portions of Wetzel's report and sought a copy of Welner's report. The Court ordered the government to produce Welner's report by Friday, July 1. The government rested on June 29, 2005.

Mills was scheduled to testify for the defense on July 1, and Cunningham was scheduled to testify on July 7. As of the morning of July 1, it became apparent that Mills had not yet provided all of his notes to the defense for production to the government, and that Welner's report would not be forthcoming for another three days. The government also moved to preclude Mills from testifying concerning the reports of its experts, because the defense had not supplemented its 2001 disclosure of Mills' testimony.

The Court commented that both the government and the defense had been laggard in meeting their discovery obligations, required that the Mills notes be produced before his testimony, and discussed the possibility of allowing Mills to return to testify

in sur-rebuttal. At noon the missing notes were found and produced. However, defense counsel decided at that point not to present Mills' testimony in its penalty case in chief, but to reserve him for sur-rebuttal: "there was a motion in limine to limit his testimony as to things that . . . occurred after his . . . examination; in other words, the experts that followed, until they either testify or they put on a rebuttal case, and to that extent I would want to withhold him. I would want to hold him for sur-rebuttal." Tr. vol. VII-2 at 3. As to the delay in producing Welner's report, the Court refused to preclude his testimony on that basis, but again stated that the defense would be allowed sur-rebuttal as well as cross-examination. *Id.* at 96.

Late on Tuesday, July 5, the defense received a copy of Welner's 72-page report. The report stated that Welner had administered the Psychopathy Checklist-Revised ("PCL-R"), a scale for the assessment of psychopathy, based upon "behavioral observations available through a videotaped interview conducted by Dr. Richard Wetzel, for which I provided questions to be posed to Mr. Fell." Welner Report at 22. Welner also scored Fell on a Violent Risk Appraisal Guide ("VRAG") and a Historical/Clinical/Risk Management ("HCR-20") scale. *Id.* at 55-56.

Fell promptly moved to exclude Welner's report and testimony, on the grounds that the government had violated the

Court's April 7 order by using Wetzel to interview Fell merely as a conduit for Welner's questions, and by securing new psychological testing without the required notice to the defense. He objected to the substantial amounts of unreliable hearsay and uncharged misconduct detailed in the report. He also asked for a *Daubert* hearing. Mot. in Limine (Doc. 182); Tr. vol. VIII-2 at 68-69; 75-85.

The Court pressed the government to specify what it intended to elicit from Welner, but the government responded that it could not be sure until the defense rested. The Court also inquired of government counsel whether Welner had used Wetzel to conduct his own testing. Tr. vol. VIII-2 at 72. The government's answer was non-responsive, and the Court inquired more specifically: "did you tell him to tell Dr. Wetzel to ask the questions that Dr. Welner wanted so that Dr. Welner could use the interview that Dr. Wetzel had to support his opinion? Is that what you did?" *Id.* at 73. Counsel for the government responded: "No. Those two were in consultation with each other prior to the interview. We told Dr. Wetzel to conduct the interview as . . . he saw fit, but we also told him that — you know, to be in touch with Dr. Welner about it, and we know that Dr. Welner prepared some of the questions, not all of them, for him to ask." *Id.* at 73-74.

The Court reserved ruling on the issue of precluding Welner's testimony, and scheduled a hearing for Monday, July 11.

The Court ordered the government to turn over to the defense all of Welner's notes and the materials he was relying on for the preparation of his report, and requested memoranda from both sides, from the defense describing specific objections to the report and the expected testimony; and from the government precisely what it intended to introduce, and whether it had disclosed the basis for Welner's opinions.

Dr. Cunningham's *Daubert* hearing was scheduled for July 7, just prior to his testimony. On July 7, however, Fell withdrew his Rule 12.2 notice and rested without calling any mental condition expert. On July 8 the defense entered into a stipulation concerning Fell's mental condition, which provided that:

> [a]fter his arrest in late 2000, Donald Fell was subjected to full psychological and psychiatric examinations. Those examinations determined that (1) he had no cognitive or neurological deficits; (2) his intellect and cognitive functions were intact; (3) and he did not suffer from any mental disease or defect. The examination also found that Fell was competent to stand trial and knew the difference between right and wrong at the time of the offenses on November 27, 2000.

Trial Ex. 14. As a result the government did not call any of its experts and introduced no evidence concerning Fell's mental condition. The July 11 hearing to determine the scope of Welner's testimony was cancelled.

Fell's mitigation evidence was largely based on his wretched childhood history of abuse and neglect. The government opened

its summation by asking rhetorically, "what do these factors have to do with the crimes in this case? And do these factors actually lessen the defendant's responsibility and culpability for these crimes?" Tr. vol. XII at 38. Later counsel asked again: "what's the connection between his background and childhood and these crimes? What about his background and childhood makes him less responsible, less culpable? What about them means that he should receive a . . . lesser sentence? *Id.* at 52. The government closed by asking and answering the question: "What's the evidence of the mitigating factors? To the extent you find some, there are not many, respectfully, and they really don't relate to the crimes. They really relate to his childhood." *Id.* at 64. Defense counsel made no objections to the government's summation.

The Court defined mitigating factor to the jury as follows:

> Before you may consider the appropriate punishment . . . you must consider whether Donald Fell has proven the existence of any mitigating factors . . . A mitigating factor is simply an extenuating fact about a defendant's life or character, or about the circumstances surrounding the murder, or anything else relevant that would suggest that a sentence of life in prison without the possibility of release is a more appropriate punishment than a sentence of death.

Id. at 152.

It listed the mitigating factors alleged by the defense, including:

> Any other factors that favor imposition of life

> imprisonment without the possibility of release, including factors in Donald Fell's childhood, background or character. The last factor . . . permits you to consider anything else about the commission of the crime or about Donald Fell's background or character that would mitigate against the imposition of the death penalty. If there are any such mitigating factors, even ones not specifically argued by the defense, . . . you are permitted by law to consider them in your deliberations.

Id. at 155.

Concerning the weighing process, the Court instructed the jury:

> The process of weighing aggravating and mitigating factors against each other . . . is by no means a mechanical process. . . . you should consider the weight and value of each factor. . . . The law contemplates that different factors may be given different weight or values by different jurors.

Id. at 158. Fell made no objection to the charge as read.

The case was submitted to the jury on July 13, and the jury returned its unanimous decision that a sentence of death be imposed on July 14, 2005.

After the trial ended, Dr. Wetzel was contacted by both the government and the defense. At the government's request he submitted a twenty-five page affidavit to the Court. In it he stated that counsel for the government contacted him to be a rebuttal witness, in case Welner was not permitted to examine Fell or to testify as a rebuttal witness. Wetzel received a substantial amount of information pertaining to the case that had been produced by Welner working with FBI investigators. Aff. at

7. Counsel for the government "made it clear that Dr. Welner would be willing to discuss material with me. He encouraged me to contact Dr. Welner and to do anything else I felt was necessary to become prepared." *Id.* Wetzel explicitly invited Welner to give him whatever advice or help he wished, as a collegial gesture. *Id.* at 8. Welner responded with a lengthy list of questions along with instructions as to how to ask the questions. *Id.* at 9. Wetzel was insulted; he stated that he had not intended to do anyone else's examination but his own, that he was doing the evaluation he thought appropriate, although he had no objection to being helpful to any of the experts in the case. *Id.* at 9-10. He noted that there was a considerable overlap between the questions offered by Welner and those he would have asked in any event, based on the new information provided by Welner and the FBI. *Id.* at 10-11.

Wetzel stressed, however, that counsel for the government did not instruct him to do anything, that counsel did not ask Wetzel to ask Welner's questions or to perform Welner's examination. *Id.* at 10, 12-13. Wetzel did ask whether there was a problem with using Welner's questions, and counsel stated that he could think of no legal reason why Wetzel should not use Welner's questions if he wanted to. *Id.* at 10. Wetzel emphatically denied that Welner had directed his re-interview of Fell. *Id.* at 11-12. Wetzel also stated that he did not

administer any tests to Fell. *Id.* at 14.

Discussion

Pursuant to Rules 29(c) and 33 of the Federal Rules of Criminal Procedure, Fell has set forth three issues, arguing that each involve violations of due process based upon prosecutorial misconduct. He has requested an evidentiary hearing.

A Rule 29(c) motion tests the sufficiency of the evidence against a defendant. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979) ("[t]he relevant question is whether, after viewing evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt"); *see also United States v. Irving*, 432 F.3d 401, 407 (2d Cir. 2005) (Rule 29 motion should be granted only if district court concludes there is no evidence upon which reasonable mind might fairly conclude guilt beyond reasonable doubt). As Fell has not challenged the sufficiency of the evidence against him, either to sustain his convictions or to sustain the imposition of a death sentence, Rule 29 does not appear to offer a basis for the relief he requests.

Rule 33 provides that upon a motion by the defendant, "the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "In considering whether to grant a new trial, a district court may itself weigh the evidence and the credibility of witnesses, but

in doing so, it must be careful not to usurp the role of the jury." *United States v. Canova*, 412 F.3d 331, 348-49 (2d Cir. 2005). "The ultimate test on a Rule 33 motion is whether letting a guilty verdict stand would be a manifest injustice." *United States v. Ferguson*, 246 F.3d 129, 134 (2d Cir. 2001).

"When prosecutorial misconduct is alleged, a new trial is only warranted if the misconduct is 'of sufficient significance to result in the denial of the defendant's right to a fair trial. The severity of the misconduct, curative measures, and the certainty of conviction absent the misconduct are all relevant to the inquiry.'" *United States v. McCarthy*, 54 F.3d 51, 55 (2d Cir. 1995) (quoting *Blissett v. LeFevre*, 924 F.2d 434, 440 (2d Cir. 1991)); *accord United States v. Elias*, 285 F.3d 183, 190 (2d Cir. 2002); *cf. Greer v. Miller*, 483 U.S. 756, 765 (1987) (prosecutorial misconduct may so infect trial with unfairness as to make resulting conviction a denial of due process, but misconduct must be of sufficient significance to result in denial of right to fair trial). A hearing on the motion is not required if the defendant's filings themselves demonstrate the legal inadequacy of his argument. *United States v. Helmsley*, 985 F.2d 1202, 1210 (2d Cir. 1993). As discussed below, Fell's allegations of prosecutorial misconduct, individually and cumulatively, do not support granting a new sentencing hearing.

I. Mental Health Evidence

The Court's April 7 order was specific: any re-interview of Fell must employ one or both of the government's two original experts, and any mental health testing by any government expert must be preceded by notice to the defense. Order at 1-2. Upon denial of the government's request for reconsideration, the order remained unchanged.

Dr. Welner's report gave rise to extremely serious and legitimate concern on the part of defense counsel, and this Court, that the April 7 order had been violated. First, Welner stated that he had made behavioral observations of Fell through a videotaped interview conducted by Wetzel, for which Welner provided the questions. Second, Welner stated that he had administered the PCL-R, a "scale for the assessment of psychopathy on July 4, 2005;" scored Fell on the VRAG, for which one's PCL-R score "is the most potentially heavily weighted item;" and evaluated him according to the HCR-20. Welner Report at 22, 55-56.

When the Court questioned government counsel, counsel responded that the government had not directed Wetzel to pose Welner's questions to Fell, and that it did not consider Welner's measures to be testing for which it was required to give notice. "We had understood your court order saying, you know, any . . . further psychological testing, bring it up with counsel, to refer

to psychological testing during the interview; in other words, with the defendant at the facility, and there wasn't any." Tr. vol. VIII-2 at 74. At the close of the hearing the Court requested briefing on the five defense objections to Welner and his report, and stated:

> Well, I think, you know, this is a big deal. I need to find out what happened here; what . . . information was provided to the [defense]; what [Dr. Welner's] opinions are, in fact; how psychopathology has been used by other courts in other districts, as to whether it's admissible or not; and what this test is all about. Or if there are other tests out there. . . . You know, it is true. I had said that the government had two experts. Those were the experts that they were going to call. But I did not exclude Dr. Welner. . . . and now, obviously, Dr. Welner used Dr. Wetzel to ask the questions that Dr. Welner wanted, and so here we are.

Id. at 85.

At that point the issues, taken from Fell's motion, that the Court expected to rule upon after the July 11 hearing were: (1) whether the government had violated the April 7 order; (2) whether Welner would be permitted to present hearsay information from numerous witnesses whose statements had not been provided to the defense, and who had not appeared on government witness lists; (3) whether Welner would be permitted to testify about numerous acts of uncharged misconduct for which no notice had been provided to the defense; and (4) whether Welner's diagnosis of "psychopathy" could withstand *Daubert* scrutiny, due either to the unreliable factual bases for his opinions or insufficient

scientific support for his principles and methodology. It is clear that complete preclusion of Welner's testimony, either because of governmental misconduct or because it would not be admissible under *Daubert*, would again be under consideration at this hearing, as well as the possibility that his testimony would be substantially limited and his report considerably redacted.

Of course, this hearing never took place; the next day counsel for the defense withdrew Fell's Rule 12.2 notice and withdrew evidence of a mental condition as a subject of expert testimony.

Was government counsel untruthful with the Court at the July 6 hearing? After consideration of the transcript and Wetzel's affidavit, the Court holds that there is no basis for concluding that the government lied. Both Wetzel and government counsel denied that the government directed the experts to have Wetzel ask Welner's questions. Government counsel further stated his belief that the April 7 order didn't preclude additional testing or evaluation done outside the interview. There is no basis to believe that counsel misrepresented his belief.

Did the government violate the April 7 order? This is a somewhat more complicated issue. The Court's intention was clear, at least to itself: re-interview of Fell to be conducted by either Rabun or Wetzel or both; no new testing without notice to defense. The government as clearly believes it complied with

the order: re-interview of Fell by Wetzel; no tests were administered to Fell.

After reviewing the order, the transcript, Welner's report and Wetzel's affidavit, the Court concludes that the intent of its April 7 order was not followed. The government may not have deliberately produced this result. Wetzel may not have believed he was being used as a proxy (and he would not have cooperated with being so used). But the Court cannot ignore that by Welner's own report he deliberately attempted to use Wetzel to obtain the interview results he was precluded from obtaining on his own.

More importantly, regardless of the government's belief that a test is only a test if it is administered in the physical presence of the subject, Welner's report states that he administered psychological testing, and that the subject was Fell. Wetzel's affidavit doesn't detract from this point. His focus, understandably, was on denying that he assisted Welner in circumventing the Court's order. He stressed that he did not administer any tests, and that Welner might have been able to review the information in such a way that Welner could say that he did not administer any tests. Aff. at 14, 18.

The Court credits Wetzel's affidavit and absolves Wetzel of any complicity in circumventing the April 7 order. By his own words, however, Welner "administered" or "scored" psychological

tests whose subject was Fell. As Wetzel discussed in his affidavit, "when there is an intent to quantify, scores are given and those scores are normed in specific populations, it is hard to say that this is not a psychological test. Most psychologists would agree that these three instruments are properly called psychological tests." Aff. at 15. The government has presented no convincing evidence that Welner did not engage in psychological testing. The April 7 order specifically required advance notice to the defense before conducting such testing.

Did the failure to comply with the April 7 order result in the denial of due process at sentencing? In assessing whether an instance of prosecutorial misconduct caused substantial prejudice, ordinarily a court would proceed to consider the severity of the misconduct, any measures to cure the misconduct, and the certainty of conviction absent the misconduct. *See Elias*, 285 F.3d at 190. Ordinarily, an evidentiary hearing would be necessary; the submissions of the parties alone do not enable this Court to judge the severity of the conduct, for example, whether the government deliberately set out to circumvent the Court's order, or whether its expert was simply a zealot who pursued his own agenda despite the restrictions imposed by the Court.

In this case however, it is unnecessary to examine the government's conduct further, because Fell cannot demonstrate a

causal link between the conduct complained of (lying to the Court and violating its order) and his withdrawal of all expert mental health evidence. *See* Mot. at 19 (government's actions precluded jury's consideration of mitigation evidence by causing Fell to withdraw all expert mental health evidence) (Doc. 209).

According to Fell,

> faced at the last moment with the toxic claims of Dr. Welner, the defense had the choice of (1) withdrawing its notice of expert evidence, thereby preventing Welner's testimony entirely, or (2) calling its expert, Dr. Mark Cunningham, Ph.D., and then trying to limit Welner's testimony at a hearing outside the presence of the jury. Since the Court had already stated that Welner would be allowed to testify, there was no assurance that the latter choice would be satisfactory.
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> Defense counsel would not have been handed this Hobson's choice if Welner's testimony had been excluded for being in violation of the Court's previous orders.

Id. at 20. The Court is in no position to second-guess the thought processes of defense counsel. But this description of the situation on July 6 suggests that these thought processes were infected by certain misapprehensions of the facts. It is true that the defense was presented at the last possible moment with a massive report that was overwhelmingly damaging to Fell's mitigation case. It is also true that the Court stated on July 1, before the government produced Welner's report, that it would not preclude Welner from testifying based on the report's

lateness.[6] It is also true that Cunningham was scheduled to testify before the hearing on admissibility of Welner's testimony.[7]

Yet it is undeniable that the Court could not preclude Welner's testimony on the grounds of prosecutorial misconduct before the demand was made. Upon being informed of the new grounds for Fell's renewed motion for preclusion of the testimony, which included violation of the April 7 order, the Court indicated it understood the gravity of the situation ("this is a big deal. I need to find out what happened here"). The Court took the allegation that its order had been flouted very seriously, immediately questioned government counsel directly, and set the entire matter for a further hearing. The Court never ruled on the motion to preclude on the grounds of prosecutorial misconduct, because Fell abandoned this claim on July 7.[8]

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[6] The Court stated on the afternoon of July 1:

> I'm not going to exclude Dr. Welner from testifying. There's a request that I exclude him. I'm not going to exclude him from testifying, but in light of the late delivery of the [report], it seems to me that sur-rebuttal responds to that, so you'll have an opportunity to rebut as well as cross-examine.

Tr. vol. VII-2 at 96.

[7] Fell did not object to this schedule.

[8] Fell also appears to claim that prosecutorial misconduct prevented him from obtaining a hearing on his claims, *see* Mem. in Supp. of Hearing at 8 (Doc. 213); on the contrary, the record demonstrates that a hearing had been scheduled to explore the issues raised by Fell in his July 6 motion in limine, the same

Taking the defense at its word, what caused it to withdraw its expert evidence was the need to keep the damaging nature of Welner's expected testimony from the jury at all cost. *See* Mot. at 20. Fell has not contended that prosecutorial misconduct created the damaging material;[9] the government was free to obtain any expert it chose, and was free to seek to introduce evidence that would rebut the expected mitigation case. The government was not free to circumvent the Court's order placing limits on the re-interview of Fell and any new psychological testing, however. That alleged circumvention was directly at issue in the hearing scheduled for July 11, along with the contention that a substantial amount of Welner's evidence was too unreliable to be admissible.

When Fell decided to drop any presentation of expert evidence on his mental condition while a challenge to the admissibility of the government's expert rebuttal evidence was pending, he also dropped his claim of misconduct by the government in obtaining its rebuttal evidence. Regardless of the reasons for Fell's decision to withdraw his expert evidence, he waived his prosecutorial misconduct claim by failing to pursue it

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issues that he has raised in his post-trial motion.

[9] There is no claim that the government concealed mitigating facts, or that, in putting Welner on, it would have presented false evidence.

at sentencing when the essential facts of his claim were known to him.[10]

II. Inconsistent Positions

During settlement negotiations and in a draft plea agreement, the government took the position that substantial mitigating evidence existed in Fell's case that would justify the imposition of a lesser penalty than a sentence of death. After the Attorney General rejected the proposed plea agreement, the government abandoned this position. At sentencing the government rejected any notion that Fell's case presented mitigating circumstances, and argued forcefully that any mitigating circumstances proffered by the defense were far outweighed by the aggravating circumstances of the case. The government

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[10] The government claims that Fell's stipulation that he was free of cognitive or neurological deficits, with intact intellect and cognitive functions, and did not suffer from any mental disease or defect, constituted an admission that he was of sound mental health, and that principles of judicial estoppel prevent him from claiming now that he had mitigating expert mental health evidence. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). The short response to this argument is that an individual who has no cognitive or neurological impairment and is free from mental disease or defect may still have psychological and emotional impediments to "sound mental health," whatever that may mean, that may appropriately be the subject of expert testimony in a mitigation case. *See Smith v. Texas*, 543 U.S. 37, 45 (2004) (evidence of troubled childhood is relevant for mitigation purposes). The defense's position, to the extent that it was revealed to the Court, has been consistent pre- and post-trial: Fell was competent, sane, free from mental disease or defect, and profoundly impaired by his experiences in childhood and youth.

specifically contradicted the assertion in the draft plea agreement that Fell had accepted responsibility, that he had assisted law enforcement, that he felt remorse, and that his background was a mitigating factor. Tr. vol. XII at 42-45, 53.

Fell sought to introduce the plea agreement; in a pre-trial ruling the Court refused to allow introduction of the plea agreement as mitigation evidence at sentencing, but allowed Fell to inform the jury that he had offered to plead guilty to count two in exchange for a sentence of life imprisonment without parole. Op. & Order at 24-27 (Doc. 131).

Fell argues that the jury was entitled to know that the government at one time believed, and stated, that the evidence established something entirely different from what it claimed at sentencing. He has cited the cases of *United States v. Salerno*, 937 F.2d 797 (2d Cir. 1991), *rev'd on other grounds*, 505 U.S. 317 (1992); *United States v. GAF Corp.*, 928 F.2d 1253 (2d Cir. 1991), *United States v. McKeon*, 738 F.2d 26 (2d Cir. 1984), and *Bradshaw v. Stumpf*, ___ U.S. ___, 125 S. Ct. 2398 (2005), in support of his argument. In all of these cases the prosecution made factual representations to a jury that were inconsistent with earlier factual representations made to a jury or filed with the court.

In *Salerno*, the government had argued to the jury in an earlier trial that defendant Auletta was a puppet of organized crime, yet in the subsequent prosecution of Auletta argued to the

jury that he was actively involved in the bid-rigging scheme that the mob controlled. A panel of the Second Circuit Court of Appeals noted that the jury was "'entitled to know that the government at one time believed, and stated, that its proof established something different from what it currently claims.'" *Id.* at 812 (quoting *GAF Corp.*, 928 F.2d at 1260).

GAF Corp. involved the third of three securities fraud trials, the first two having terminated in mistrials. Before the first trial the government filed a bill of particulars, stating that illegal trades in Union Carbide stock in October and November 1986 were linked. For the third trial the government argued the differences between the October and November trades. The prior inconsistent bill of particulars should have been considered an admission by the government, and should have been submitted for the jury's consideration, concluded the Second Circuit panel. *GAF Corp.*, 928 F.2d at 1262.

In *McKeon*, an opening statement made by defense counsel at defendant's second trial that was factually inconsistent with his opening statement in defendant's third trial on the same charges was admissible. *McKeon*, 738 F.2d at 33.

In the recent Supreme Court decision of *Bradshaw v. Stumpf*, a federal habeas case, remand to the Sixth Circuit was required for consideration of whether the state prosecutor's use of inconsistent theories as to who was the triggerman in a capital

murder case violated due process at sentencing. 125 S. Ct. at 2408. At Stumpf's sentencing, the prosecutor had argued that Stumpf was the triggerman. In the subsequent trial of Stumpf's accomplice, the same prosecutor, presenting new evidence, argued that the accomplice was the triggerman. *Id.* at 2403-04.

As this Court has previously stated, *see* Mem. Op. & Order at 5 (Doc. 56), there is a fundamental distinction between the cited cases and Fell's situation: the statements in the government's draft plea agreement (to the extent that they can be considered statements of fact rather than opinion) were never presented by the government to a court or to a jury. The plea agreement was never executed; it was never filed with the Court, except as an attachment to the briefing on this matter. The government did not make inconsistent arguments in this case; as Fell's brief attests, in the context of plea negotiations, the government did not "argue" a position at all. At that time it "agreed" with Fell's view of the evidence, but later argued to the contrary to the jury. Mot. at 24. It was not unfair to withhold evidence of the failed plea negotiations from the jury.

III. Prosecution Summation

Fell contends that the government argued to the jury that it should disregard mitigating evidence about Fell's childhood and background because the evidence was not connected to the crimes. He claims that this was constitutional error, and that the jury

charge did not correct the error.

A jury must

> be able to consider and *give effect to* a defendant's mitigating evidence in imposing sentence. . . . For it is only when the jury is given a vehicle for expressing its reasoned moral response to that evidence in rendering its sentencing decision, that we can be sure that the jury has treated the defendant as a uniquely individual human being and has made a reliable determination that death is the appropriate sentence.

Penry v. Johnson, 532 U.S. 782, 797 (2001) (*Penry II*) (emphasis in original; internal quotations omitted); *accord Tennard v. Dretke*, 542 U.S. 274, 285 (2004). Evidence of a troubled or abusive childhood need not bear any link or nexus to the crime of conviction in order to be relevant mitigating evidence. *Smith v. Texas*, 543 U.S. 37, 45 (2004).

The government cannot deny that it argued that there must be a connection between Fell's background and childhood and the crimes. It asked "what do these factors have to do with the crimes in this case?" Tr. vol. XII at 38. "[W]hat's the connection between his background and childhood and these crimes?" *Id.* at 52. "[T]he [mitigating factors] don't relate to the crimes." *Id.* at 64. The government contends however that it may permissibly argue lack of connection; that only were it to argue that the jury should not even consider a defendant's childhood or background would it run afoul of the Constitution.

This is a creative distinction, one that arguably has been

approved by two members of a Ninth Circuit Court of Appeals panel, *see Sims v. Brown*, 425 F.3d 560, 580 (9th Cir. 2005), but in this Court's opinion such a distinction cannot be squared with the Supreme Court's repeated holding that relevant mitigating evidence need not demonstrate a link to the crime. *See Smith v Texas*, 543 U.S. at 45; *Tennard*, 542 U.S. at 285; *Penry II*, 532 U.S. at 797.

To be sure, government counsel may permissibly argue in summation that the jury should accord little or no weight to a defendant's mitigating evidence, and it did so here. But the government tied this acceptable argument with its unacceptable comments, stating that the jury need not give much if any weight to Fell's background and childhood evidence *based upon* its irrelevance to the crimes he committed. Tr. vol. XII at 37-38.[11]

Any barrier to the consideration of mitigating evidence in a capital case is constitutionally infirm, whether it is erected by statute, by the court, by an evidentiary ruling, *see McKoy v. North Carolina*, 494 U.S. 433, 442 (1990), or by the arguments of

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[11] The prosecutor stated:

> you should consider, one, what do these [mitigating] factors have to do with the crimes in this case? And do these factors actually lessen the defendant's responsibility and culpability for these crimes? . . . [E]ven if you find evidence of some of those mitigating factors, we submit to you that the weight of these factors is not that heavy, and you need not give them much, if any, weight *based upon those two questions.*

Tr. vol. XII at 37-38 (emphasis supplied).

counsel. A sentencer's failure to consider all of the mitigating evidence in a capital case risks erroneous imposition of a death sentence. *Mills v. Maryland*, 486 U.S. 367, 375 (1988). Arguments of counsel however do not have the same persuasive force on a jury as an instruction from a court, especially if the jury has been told that the arguments of counsel are not evidence. *See Boyde v. California*, 494 U.S. 370, 384-85 (1990).

Fell would be entitled to a new sentencing hearing if there is a reasonable likelihood that the jury was so infected by the prosecutor's misstatements that it felt obliged to disregard constitutionally relevant evidence relating to his background and childhood unless it found a connection to the capital crimes. *See id.* at 384-85; *see also Hall v. Luebbers*, 341 F.3d 706, 716 (8th Cir. 2003) (prosecutor's argument violates due process if "remarks 'infected the trial with unfairness'") (quoting *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)). The Eight Circuit has analyzed whether a prosecutor's closing argument in a death penalty case violated due process using a four-part test: it

> (1) measure[s] the type of prejudice that arose from the argument; (2) examine[s] what defense counsel did in his argument to minimize the prejudice; (3) review[s] jury instructions to see if the jury was properly instructed; and (4) determine[s] if there is a reasonable probability that the outcome of the sentencing phase would have been different, taking into account all of the aggravating and mitigating circumstances.

Antwine v. Delo, 54 F.3d 1357, 1363 (8th Cir. 1995).

"[T]he arguments of counsel . . . must be judged in the context in which they are made. *Boyde*, 494 U.S. at 385. Counsel for the government reminded the jury to listen to the Court's instructions. The improper remarks were not particularly inflammatory, although they were emphasized. Counsel for the defense stressed the mitigating effect of Fell's childhood history. He did not object to the prosecutor's improper argument. The Court defined mitigating factors to include Fell's childhood and background, and instructed the jury that it must weigh aggravating and mitigating factors. It was not asked to, nor did it offer any curative instruction.[12]

After reviewing the substantial mitigating evidence presented relating to Fell's childhood, the summations from both sides, and the instructions given to the jury, the Court concludes that under all the circumstances the prosecutor's improper argument did not infect the proceedings with an unfairness that resulted in a denial of due process. It is not reasonably probable that the outcome of the penalty phase of the

[12] Ten jurors independently found as an additional mitigating factor: "[t]otal life experience, failure of the state of Pennsylvania social and mental health services to effectively intervene in his childhood abuse and to treat or address his early antisocial behavior." Special Verdict Form at 14 (Doc. 200). This fact could support the argument that the jury appropriately weighed mitigating factors relating to Fell's childhood despite the government's remarks, although we cannot know whether the jury did find the factors outweighed by the aggravating evidence or found the factors but disregarded them for their lack of connection to the crimes of conviction.

trial would have been different had the prosecutor not made the improper remarks.

Conclusion

Of the three claims of prosecutorial misconduct, the Court finds that the undisputed evidence shows that a pre-trial order of the Court was not followed, and the government's summation improperly commented on Fell's mitigation evidence. Fell has not shown that an evidentiary hearing is warranted on the issue of whether the government misrepresented facts to the Court; the remarks of counsel to the Court are consistent with the sworn affidavit of Dr. Wetzel. The conduct, individually and in combination, did not deny Fell due process of law, or result in a miscarriage of justice. Accordingly, Fell's motions for judgment of acquittal and new trial (Doc. 209) is denied. Sentencing in this matter is scheduled for June 16, 2006 at 9:30 a.m.

Dated at Burlington, in the District of Vermont, this 24th day of April, 2006.

/s/ William K. Sessions III
William K. Sessions III
Chief Judge
U.S. District Court